Cases and Materials on Employment Discrimination

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Cases and Materials on Employment Discrimination

Tenth Edition

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To Leila, Meghan, Moira, the Marks, Jessica, and Jack

—C.A.S.

To Jason, and to my parents, Joan and Don Bornstein

—S.B.

To Margaret, Michael, and Lanier

—M.J.Z.

SUMMARY OF CONTENTS

CONTENTS

PREFACE

This Tenth Edition welcomes a new co-author, Stephanie Bornstein, who brings new energy and a heightened sensibility to the enterprise in addition to her deep expertise, especially in the rapidly developing area of gender discrimination. She is a worthy successor to Mike Zimmer, a driving force since the First Edition in 1982, and Rebecca White, an invaluable co-author since the Sixth Edition in 2003. Mike's name remains as an author to help perpetuate his memory; Rebecca, with her usual humility, chose not to continue to be listed. But it would be unforgiveable not to acknowledge that both of their contributions (as well as those of prior co-authors Deborah Calloway and Dick Richards) pervade the current edition. They are much missed, personally and professionally. Mike was indescribable as a human and a scholar, and we are thankful that Rebecca poured so much intellect and energy into this project while guiding the University of Georgia Law School to even greater heights as Dean.

As for the subject matter of this book, it continues to evolve in the courts, albeit perhaps at a slower pace than in the past. But there are still eye-opening developments, such as the 6-3 decision in *Bostock v. Clayton County* in 2020, holding that discrimination on the basis of sexual orientation or transgender status is within Title VII's ban on sex discrimination. Less startling but still very significant was the Court's decision the same year in *Our Lady of Guadalupe v. Morrissey-Berru*, radically expanding the "ministerial exception" to the antidiscrimination statutes. Beyond the courts, the casebook, as has always been true, attempts to keep its adopters abreast of the literature, much of which brings important insights from a new crop of discrimination scholars.

A new edition is always an occasion for reflecting not just on what's happening in the area but how it should be taught. While veteran adopters will find the structure of this book largely the same, they will notice significant updating and some changes, many reflecting Stephanie's improvements. Despite the inclusion of new cases, it is also only marginally longer than the Ninth Edition.

As before, the casebook begins with the three chapters analyzing each of the three basic theories of discrimination—individual disparate treatment, systemic disparate treatment, and disparate impact (Chapters 1, 2, and 3), followed by a chapter on the interrelation of those theories (Chapter 4). It then moves to "special problems" of discrimination law (Chapter 5), treating coverage, sex discrimination, religion, national origin discrimination, and age. Chapter 6 then follows, dealing with retaliation. These chapters continue the prior editions' merger of the treatment of the Age Discrimination in Employment Act and the Reconstruction Civil Rights Acts, primarily 42 U.S.C.A. §1981, into the Title VII discussion. Pedagogically, the casebook reflects the statutory and common law unification of discrimination analysis under all three statutes, although the significant differences

among these laws are noted in the relevant chapters and collected in Chapter 5 on "special problems."

Chapter 7, dealing with the Americans with Disabilities Act, has settled down a bit. There are numerous micro-modifications as the statute continues to mature, but no new principal cases. The remaining three chapters — Chapter 8, Procedures; Chapter 9, Remedies; and Chapter 10, Risk Management — try to concisely treat issues that, though critical for how employment discrimination is practiced "on the ground," often seem to be afterthoughts in many courses. To help cope with the problem of length, these chapters remain shorter and more didactic.

Some professors who use this book have asked about coverage. In a three-credit course, it is easily possible to teach Chapters 1 through 7. The choice of the remaining material is a matter of individual instructor preference, but in an environment that seems to prefer more "practice ready" graduates, these three chapters are all candidates for inclusion, although teaching all three may exhaust both professor and students.

As prior users know, a website supports the teaching mission of the casebook. Within normal limits of scholarly procrastination, it is frequently updated to reflect recent developments. It does not attempt to track every judicial, legislative, or administrative change as there are services that do that far better; rather, the goal is to identify the more important developments and key them to the casebook. The webpage also suggests teaching ideas and provides links to a variety of other resources. Please visit it at http://law.shu.edu/discrimination. The site contains a "contact" button, but the authors can also be reached at:

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A final word about the editing of excerpted material: All omissions are indicated by ellipses or brackets, except that citations (including parentheticals), footnotes, and internal cross-references are deleted with no indication. Footnotes in extract retain their original numbers, while those added by the authors are indicated by asterisks and daggers.

Charles A. Sullivan
Stephanie Bornstein

June 2021

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Our colleagues over the years have also provided numerous useful insights. A deep debt of gratitude to Steve Willborn for niggling (and not so niggling) corrections every time he uses the book. And thanks to Jake Barnes and Calvin Sharpe for reviewing portions of earlier editions of this book and steering us closer to the correct path. Our students have also been essential to keeping this work grounded and accessible even as the field of employment discrimination becomes increasingly complex and sophisticated. We owe a special debt to Carol McGeehan, who copyedited the first edition, and who gently nudged us through many subsequent editions. Sarah Hains has been terrific in steering the current manuscript through the editorial process.

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NOTE TO STUDENTS

A. WHAT YOU'LL BE STUDYING

This book is devoted to employment discrimination, one of the most important areas of legal regulation of the rights and responsibilities of employers and employees. This course is concerned with the question of "discrimination" in employment and is, therefore, limited to legal doctrines that fall within that term. Indeed, much of this book is devoted to the twin questions of how "discrimination" should be defined and how it is proven in the litigation context. As you will see, employment discrimination, on both the social and the legal levels, is a complex and controversial problem, affecting the rights of all workers in one way or another.

But however important the topic of employment discrimination is, it is only a subset of the more general problem of legal regulation of the employment relationship. As you will learn, "employment discrimination" is usually limited to discrimination against employees on the basis of statutorily defined characteristics, such as race, color, sex, age, national origin, religion, and disability. While these categories are the traditional domain of the law of employment discrimination, employers routinely "discriminate" (perhaps we should use the word "differentiate") among employees or applicants in ways that have nothing to do with the protected classifications covered by discrimination statutes. Further, employers may base their actions on rational reasons (hiring the best qualified applicant); questionable reasons (promoting the child of an important customer over a better worker who lacks such "connections"); reasons that are eccentric but not necessarily legally wrong (choosing employees on the basis of astrological sign); or socially and morally unacceptable reasons (firing a "whistleblower" whose conduct saved human lives).

The ultimate question is what, if any, limitations the law should place on the employer's power to deal with employees. The antidiscrimination laws reflect one societal answer. Our study, then, focuses on how and when the law should intervene to remedy inequality in the workplace.

The broader question, focusing on other elements of the employment relationship like contract and tort applications, wages, safety, and privacy rights at work, is taken up in courses titled "Employment Law" or "Work Law." *See generally* TIMOTHY P. GLYNN, CHARLES A. SULLIVAN, & RACHEL ARNOW-RICHMAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS (4th ed. 2019).

As a discipline, employment law is a sprawling area that begins with a core commitment to private ordering through contracts. In employment, as in other areas of contract law, policing the fairness of bargains is the exception rather than the rule. Contract law purported to implement this approach to employment by adopting a general rule that prevailed in the United States for nearly a century: absent an express written contract for a specified term, the relationship between an employer and its employees was "at will." One court explained the rule and

its rationale: "Generally speaking, a contract for permanent employment, for life employment, or for other terms purporting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and a discharge without cause does not constitute a breach of such contract justifying recovery of damages." *Forrer v. Sears, Roebuck & Co.*, 153 N.W.2d 587, 589 (Wis. 1967). While framed neutrally, in the sense that either party can terminate the relationship without liability to the other, the at-will doctrine in practice meant that the employer could discharge an employee "for good reason, bad reason, or no reason at all."

Because contract law provided few rights for most workers, numerous legislative interventions were designed to address deficiencies, or perceived deficiencies, of the at-will regime. The antidiscrimination statutes are a prime example, but employment law treats a huge variety of other interventions of greater or lesser legal and practical significance. On the federal level, these include:

- Leave policies: the Family and Medical Leave Act (FMLA), 29 U.S.C. §§2601 et seq.
- Wage and hour laws: the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201 et seq.
- Workplace safety: the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651 et seq.
- Pension and fringe benefits: the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1002 et seq.
- Privacy protection: the Employee Polygraph Protection Act (EPPA), 29 U.S.C. §2002, and the Genetic Information Nondiscrimination Act, 42 U.S.C. §2000ffet seq.
- Layoff: the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §2101 et seq.
- Whistleblower protection: the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.

These statutes vary greatly in terms of their protection and coverage. For example, EPPA covers essentially all private-sector employers in the United States, but WARN reaches only larger employers conducting "mass layoffs." Most federal statutes have state analogs, some of which provide substantially more employee rights than do their federal counterparts. Further, some areas of employment law, such as workers' compensation, are primarily state regimes, and, of course, state tort law provides limited but important protections, most notably the "public policy tort," which has been reinforced by broad "whistleblowing" statutes in a few states. *E.g.*, N.J. Conscientious Employee Protection Act, N.J. Stat. Ann. §§34:191 et seq. Finally, some groups of employees have their own sources of protection — public-sector workers have constitutional rights, and civil servants and public school and college and university teachers have tenure systems.

A third group of workers with special protection consists of unionized workers covered by collective bargaining agreements. This regime, studied as "Labor Law," is based on the principle that employees gain countervailing power vis-à-vis their employers by joining together to negotiate as a group with their employers. While the origins of the union movement reach back well before the nineteenth century,

unions did not become legal, and respectable, for many years. During the Great Depression, the federal government adopted what is now known as the National Labor Relations Act (NLRA), 29 U.S.C. §§151 et seq., which encourages unions by declaring it an unfair labor practice for employers to discriminate against workers seeking to unionize and by requiring the employer to bargain with unions that succeed in organizing that employer's workforce. *See generally* The Developing Labor Law: the Board, the Courts, and the National Labor Relations Act (7th ed. 2018) (John E. Higgins, et al. eds.). While wages and hours are a prime area of concern, most unions also ensure job security for workers through seniority systems and by requiring just cause for discharge. This legal regime, however, scarcely proved a panacea. While many unions succeeded in raising wages, improving working conditions, and providing increased job security for those they represented, large segments of the American workforce remain unorganized. The proportion of the organized workforce has shrunk to less than that when the NLRA was passed. In 2020, only 10.8 percent of the total U.S. workforce, and a mere 6.3 percent of the private-sector workforce, were union members. News Release, Bureau of Labor Statistics, Union Members–2020 (Jan. 22, 2021), https://www.bls.gov/news.release/pdf/union2.pdf. In contrast, 34.8 percent of the public-sector workforce was unionized. *Id.*

There is one final, ironic piece of context for our study. Despite their critical importance in labor law, employment law, and employment discrimination law, the very definition of the terms "employer" and "employee" draws on doctrines invented for a different purpose altogether—whether an employer was liable for the torts committed by its employees (or, as it would have more typically been phrased, whether a "master" was liable for the torts of his "servants"). The answer to this question at common law was found in the law of agency and depended on whether the tortfeasor was a servant (or employee) as opposed to an "independent contractor." If the principal had sufficient "control" over the work of the agent, it was liable for the agent's torts. The principal was then called a master or an employer, and the agent became a servant or an employee. If the degree of control was insufficient, the agent was labeled an "independent contractor," and the principal was not liable for the agent's torts. Disputes over these terms now play an outsized role in the field and will have special relevance in our study of harassment law.

B. THE ORGANIZATION OF THIS BOOK

Antidiscrimination statutes have spawned complex legal theories defining discrimination and the methods used to prove it. Although the basic prohibitions enjoy broad support, the development of theories of proof and the enactment of statutory reforms expanding employer duties have generated considerable social controversy. Affirmative action, sexual harassment, discrimination on the basis of sexual orientation, and disparate impact liability are just a few of the issues that have tested the limits of discrimination theory.

This casebook undertakes a complete consideration of the federal antidiscrimination laws.

The enactment of Title VII as part of the Civil Rights Act of 1964 marked a legal watershed. Although the statute had state and federal precursors, they had proved insufficient to deal with the problem of employment discrimination. Title VII marked the first comprehensive national attack on the problem of employment discrimination.

In the wake of Title VII, a number of developments expanded the federal courts' involvement with employment problems. First, Congress passed additional statutes, most notably the Age Discrimination in Employment Act of 1967 (ADEA), prohibiting discrimination against older workers, and the Americans with Disabilities Act of 1990 (ADA), barring discrimination against individuals with disabilities. Second, the Supreme Court resuscitated civil rights statutes passed during the Reconstruction era following the Civil War. Sections 1981 and 1983 of Title 42 of the United States Code were among the laws passed to protect the newly freed slaves in the South by implementing the Thirteenth, Fourteenth, and Fifteenth Amendments. Although these statutes had been eviscerated by the Supreme Court in the years shortly after their enactment, the Warren Court revived the early statutes, creating a wide range of statutory tools to deal with employment discrimination. While the Supreme Court thereafter restricted both the modern civil rights laws and their Reconstruction-era predecessors, Congress has reacted strongly on a number of occasions to restore the effectiveness of the antidiscrimination statutes. Most notably, the Pregnancy Discrimination Act of 1978 defined pregnancy discrimination as sex discrimination after the Supreme Court had held to the contrary, and the Civil Rights Act of 1991 reversed or substantially modified a number of Supreme Court decisions limiting the effectiveness of Title VII and §1981. And more recently, Congress acted to overturn restrictive judicial interpretations in both the Americans with Disabilities Act Amendments Act of 2008 and the Lilly Ledbetter Fair Pay Act, passed in 2009.

This book considers all of these legislative and judicial efforts to address discrimination in employment, and it approaches the question through the lens of the three theories of liability the courts have developed—individual disparate treatment, systemic disparate treatment, and disparate impact. Some have questioned whether these understandings of discrimination adequately capture the underlying phenomenon, but they are obviously the place to start. To complicate matters, they apply differently across the four major statutes we will study—Title VII, the ADEA, 42 U.S.C. §1981, and the ADA.

Chapter 1 takes up the most basic concept, intentional discrimination against particular applicants or employees—individual disparate treatment discrimination. Chapter 2 then extends the intentional discrimination concept to broader patterns of such practices—systemic disparate treatment. Chapter 3 considers an alternative test of discrimination, disparate impact. Chapter 4 attempts to synthesize the approaches previously developed into a coherent theory of discrimination. Chapter 5 takes up special problems that arise when antidiscrimination law is applied to such issues as pregnancy, sexual harassment, sexual orientation, religion, national origin, and age. Chapter 6 then considers an issue that can arise in connection with all of the antidiscrimination statutes—retaliation for opposing discrimination or participating in proceedings under the various laws.

In Chapter 7, the casebook turns to a statute that approaches the question of discrimination somewhat differently. The Americans with Disabilities Act borrows discrimination concepts from the earlier statutes but applies them in unique ways to a form of discrimination that is itself very different from those studied previously. After several narrowing Supreme Court decisions, the ADA was reinvigorated with the passage of the Americans with Disabilities Act Amendments Act of 2008.

Chapters 8 and 9 then cover important but second-order questions that have arisen under the antidiscrimination statutes. Thus, Chapter 8 considers enforcement procedures, focusing primarily on Title VII, which is the procedural paradigm for both the ADEA and the ADA. Chapter 9 analyzes the remedies available to redress violations of all the statutes addressed in this book.

The remaining chapter takes a somewhat different tack. The centrality of the antidiscrimination statutes to employment in the United States has led to a number of "risk management" strategies by employers, and Chapter 10 undertakes a study of two of the most important of these—the use of arbitration as an alternative to litigation to resolve discrimination disputes and the settlement and release of potential claims.

CHAPTER 1

INDIVIDUAL DISPARATE TREATMENT DISCRIMINATION

A. INTRODUCTION

The law of employment discrimination in the United States developed as a result of the nationwide struggle for civil rights in the mid-twentieth century. While some state and federal efforts to combat race and sex discrimination laid the groundwork, the passage of the Civil Rights Act of 1964 marks the beginning of a comprehensive body of federal law prohibiting employment discrimination. The 1964 Act was enacted primarily to outlaw race discrimination, yet it also included protections for other status characteristics (color, sex, national origin, and religion). The political history leading up to the 1964 Act's passage is both fascinating and important, yet well beyond the scope of this course. It is the subject of countless books, articles, and documentaries, which we hope you will explore on your own. *E.g.*, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965 (1987); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963 (1988); CLAY RISEN, BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT (2014); TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 (2014). For a detailed legislative history of the passage of Title VII, see Eskridge et. al., *The Story of the Civil Rights Act of 1964 and the Classic Procedures of Statute-Creation*, 2-39 *in* CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY (6th ed. 2020).

Our study of the law of employment discrimination focuses on a series of federal statutes that deal with various aspects of the phenomenon. These laws include Title VII of the Civil Rights Act of 1964; the post–Civil War Reconstruction statutes, especially 42 U.S.C. §1981; the Equal Pay Act of 1963 (EPA); the Age Discrimination in Employment Act of 1967 (ADEA); and the Americans with Disabilities Act of 1990 (ADA). Notably, but also beyond our scope, most states have their own versions of these federal statutes that either replicate or provide greater protections than federal law but are usually construed by looking to federal case law interpreting the federal statutes.

The avenues of relief under the federal statutes differ from each other in important respects, but all are concerned with discrimination in employment. It is "discrimination" that provides the unifying theme for this casebook. That concept,

however, has been developed by the courts in ways that are not always intuitively obvious. Indeed, "discrimination" is now a term of art that embraces several different theories, each with its own distinctive application.

In broad terms, three statutes adopt a unitary definition of what has been called "disparate treatment" discrimination. The term originated in cases decided under Title VII and has been applied in both ADEA cases and suits brought under §1981. Disparate treatment, however, has developed in two distinct ways. Individual disparate treatment is the focus of this chapter, while systemic disparate treatment is taken up in Chapter 2. In addition, Title VII jurisprudence developed the theory of "disparate impact" discrimination, which is available only in a considerably diluted form under the ADEA and not at all under §1981. Disparate impact is considered in Chapter 3. The Equal Pay Act and the Americans with Disabilities Act also prohibit individual and systemic discrimination and bar practices with a disparate impact; however, as developed in Chapters 5 (EPA) and 7 (ADA), the two are distinct in many ways from the other antidiscrimination statutes.

B. PROVING DISCRIMINATION

Discrimination has two quite distinct meanings. One is the "recognition and understanding of the differences between one thing and another." The second, the one this book focuses on, is "the unjust or prejudicial treatment of different categories of people . . . especially on the grounds of race, age, or sex [disability, sexual orientation, etc.]." The New Oxford American Dictionary (3d ed. 2015). In *Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977), the Court provided a definition of disparate treatment discrimination and distinguished it from disparate impact:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in most situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory. . . . Either theory may, of course, be applied to a particular set of facts.

This definition leaves much unexplored, particularly what it means to treat someone differently "because of" a prohibited trait, a question that has vexed the courts over the years. And this excerpt does not tell us what "discriminatory motive" means, which is a core question for all of the antidiscrimination statutes, including whether the motive must be conscious or, instead, "implicit" discriminatory impulses suffice.

1. What Is Discrimination and How Is It Proved?

Slack v. Havens

7 FEP 885 (S.D. Cal. 1973), *aff'd as modified,* 522 F.2d 1091 (9th Cir. 1975)

THOMPSON, J.:

This action is brought by the plaintiffs, four black women, who allege they were discriminatorily discharged, due to their race, in violation of the Civil Rights Act of 1964, specifically 42 U.S.C. §2000e-2(a)(1). . . .

On January 31, 1968, plaintiffs Berrel Matthews, Emily Hampton and Isabell Slack were working in the bonding and coating department of defendant Industries' plant, engaged in preparing and assembling certain tubing components for defendant's product. A white co-worker, Sharon Murphy, was also assigned to the bonding and coating department on that day and was performing the same general work as the three plaintiffs mentioned above. The fourth plaintiff, Kathleen Hale, was working in another department on January 31st.

Near the end of the working day, plaintiffs Matthews, Hampton and Slack were called together by their immediate supervisor, Ray Pohasky, and informed that the following morning, upon reporting to work, they would suspend regular production and engage in a general cleanup of the bonding and coating department. The cleanup was to consist of washing walls and windows whose sills were approximately 12 to 15 feet above the floor, cleaning light fixtures, and scraping the floor which was caked with deposits of hardened resin. Plaintiffs Matthews, Hampton and Slack protested the assigned work, arguing that it was not within their job description, which included only light cleanup in their immediate work areas, and that it was too hard and dangerous. Mr. Pohasky agreed that it was hard work and said that he would check to see if they had to do it. . . .

On the following work day, February 1, 1968, plaintiffs Matthews, Hampton, and Slack reported to the bonding and coating department along with Sharon Murphy, their white co-worker. However, Mr. Pohasky excused Sharon Murphy to another department for the day, calling in plaintiff Kathleen Hale from the winding department where she had been on loan from the bonding and coating department for about a week. Mr. Pohasky then repeated his announcement that the heavy cleaning would have to be done. The four plaintiffs joined in protest against the heavy cleanup work. They pointed out that they had not been hired to do janitorial type work, and one of the plaintiffs inquired as to why Sharon Murphy had been excused from the cleanup detail even though she had very little seniority among the ladies in the bonding and coating department. In reply, they were told by Mr. Pohasky that they would do the work, "or else." There was uncontradicted testimony that at sometime during their conversation Pohasky injected the statement that "Colored people should stay in their places," or words to that effect. Some further discussion took place between plaintiffs and Pohasky and then with Gary Helming, plaintiffs' general supervisor, but eventually each of the plaintiffs was taken to the office of Mr. Helming where she was given her final paycheck and fired. Plaintiff Matthews testified without contradiction that on the way to Mr. Helming's office Mr. Pohasky made the comment that "Colored folks are hired to clean because they clean better." . . .

The general cleanup work was later performed by newly-hired male employees. Sharon Murphy was never asked to participate in this cleanup before or after the plaintiffs' termination. . . .

Having concluded that defendant Industries is an "employer" under Title VII of the Civil Rights Act for the purposes of this action, we must next consider whether plaintiffs' termination amounted to unlawful discrimination against them because of their race. Defendants deny that the facts support such a conclusion, contending that plaintiffs' case amounts to nothing more than a dispute as to their job classification.

Admittedly, the majority of the discussion between plaintiffs and Industries' management on January 31 and February 1, 1968, centered around the nature of the duties which plaintiffs were ordered to perform. Plaintiffs pointed out that they had not been hired with the understanding that they would be expected to perform more than light cleanup work immediately adjacent to their work stations. They were met with an ultimatum that they do the work — or else. Additionally, no explanation was offered as to why Sharon Murphy, a white co-worker, had been transferred out of the bonding and coating department the morning that the heavy cleaning was to begin there, while plaintiff Hale was called back from the winding department, where she had been working, to the bonding and coating area, specifically for participation in the general cleanup. It is not disputed that Sharon Murphy had less seniority than all of the plaintiffs except plaintiff Hale (having been hired 8 days prior to plaintiff Hale) and no evidence of a bona fide business reason was ever educed by defendants as to why Sharon Murphy was excused from assisting the plaintiffs in the proposed cleaning project.

The only evidence that did surface at the trial regarding the motives for the decisions of the management of defendant Industries consisted of certain statements by supervisor Pohasky, who commented to plaintiff Matthews that "colored folks were hired to clean because they clean better," and "colored folks should stay in their place," or words to that effect. Defendants attempt to disown these statements with the argument that Pohasky's state of mind and arguably discriminatory conduct was immaterial and not causative of the plaintiffs' discharge.

But defendants cannot be allowed to divorce Mr. Pohasky's conduct from that of Industries so easily. First of all, 42 U.S.C. §2000e(b) expressly includes "any agent" of an employer within the definition of "employer." Secondly, there was a definite causal relation between Pohasky's apparently discriminatory conduct and the firings. Had Pohasky not discriminated against the plaintiffs by demanding they perform work he would not require of a white female employee, they would not have been faced with the unreasonable choice of having to choose between obeying his discriminatory work order and the loss of their employment. Finally, by backing up Pohasky's ultimatum the top level management of Industries ratified his discriminatory conduct and must be held liable for the consequences thereof. . . .

From all the evidence before it, this Court is compelled to find that defendant Industries, through its managers and supervisor, Mr. Pohasky, meant to require the plaintiffs to perform the admittedly heavy and possibly dangerous work of cleaning the bonding and coating department, when they would not require the same work from plaintiffs' white fellow employee. Furthermore, it meant to enforce that decision by firing the plaintiffs when they refused to perform that work. The

consequence of the above was racial discrimination whatever the motivation of the management of defendant Industries may have been. Therefore, the totality of Industries' conduct amounted, in the Court's opinion, to an unlawful employment practice prohibited by the Civil Rights Act, specifically, 42 U.S.C. §2000e-2(a)(1).

NOTES

1. *At-Will Rule Modified.* In the United States, "at will" is the default rule for employment, Restatement of Employment Law §2.01 (Am. Law Inst. 2015), which means that employers can terminate employees at any time for good reason, bad reason, or no reason at all. An exception to the at-will rule is when the reason is an illegal one, such as conduct that violates an antidiscrimination statute or the public policy tort. Restatement §5.02.

2. *The Statutory Language.* The core prohibitions of Title VII are found in §703(a), which declares it an "unlawful employment practice" for an employer —

> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a) (2021). Additional sections impose similar prohibitions on labor unions and employment agencies. 42 U.S.C. §2000e-2(b) & (c).

3. *Antiretaliation and Labor Law Protection.* In addition to this core prohibition on discrimination, Title VII also has an important provision that prohibits retaliation against employees who oppose discrimination. §704(a), 42 U.S.C. §2000e-3(a). Suppose Slack and her co-workers contended they were fired because they opposed what they reasonably and in good faith believed to be a discriminatory job assignment. Would they have won on that theory? Retaliation is discussed in Chapter 6.

For students of labor law, would the protest of the Black workers against being assigned the cleaning work be "concerted activity for mutual aid or protection" that is safeguarded by the National Labor Relations Act, even if there is no union? *See* Robert A. Gorman & Matthew W. Finkin, Labor Law Analysis and Advocacy, ch. 16 (2013). A union might have provided even more protection. But their insubordination by refusing to follow Pohasky's orders might have been "good cause" to discharge them even under a standard collective bargaining agreement. The general rule is that workers must work now, grieve later, even if the boss's order violates the collective bargaining agreement. *See* Elkouri & Elkouri, How Arbitration Works, ch. 5 (Kenneth May ed., 8th ed. 2016).

4. *Unequal Treatment Not Enough.* The four African American plaintiffs in *Slack* were treated differently than Sharon Murphy, a white worker. But unequal treatment, in and of itself, is not a statutory violation unless it is "because of" the plaintiffs' race. While unequal treatment is some evidence that the assignment was made *because of* race, is it enough evidence? Would there be sufficient evidence in the case

without the statements of Pohasky to support a factfinding that the cleaning assignment was given to plaintiffs because they were Black? Suppose you represented the defendant in *Slack*. What information would you look for with respect to Sharon Murphy?

5. *Pohasky's Statements.* Many of us probably intuit that discrimination involves animus by the discriminator. Thus, this case would be easy if Pohasky said, "I don't like African Americans, so I assign them to the worst jobs." While Pohasky may have harbored such emotions, animus is not actually required for a violation. Pohasky's admission of assigning plaintiffs to the cleaning work because they were "colored" suffices. Even though he suggested that African Americans make better cleaners, the obvious negative implication is that they can only do menial jobs like cleaning. Pohasky's views can be seen as part of our history of racial subordination, in which assigning racial minorities to lesser jobs was common. But does it matter whether he thought Black workers inferior or superior in their ability to clean? So long as he was treating individuals unequally because of race, there would be a violation of §703(a). In short, Title VII generally considers acting with the intent of treating individuals differently on racial grounds as impermissible, regardless of whether the motive is malign, benign, or neutral.

6. *Admissions.* From an evidentiary standpoint, Pohasky was an agent of the employer acting within the scope of his agency in assigning the workers to their tasks. For that reason, Havens Industries was liable for his discrimination, even if the company was otherwise not discriminating. But Pohasky's agency has another effect: he was not only acting within the scope of his agency in assigning the plaintiffs, but he was also speaking within the scope of his agency in explaining the reason for the assignment. Such statements as "colored folks are hired to clean because they clean better," therefore, could be introduced into evidence against the employer, despite the hearsay rule and regardless of their "truth." As a practical matter, statements as unambiguous as this will almost always establish the key element in a discrimination case — that Pohasky assigned the cleaning to the plaintiffs "because of" their race. As we will see, such admissions-against-interest testimony related to the at-issue employment decision is sometimes described as "direct evidence" of discrimination and is very powerful. See Note 5, p. 87. But we will also see that even such statements, if not linked to the decision or made by non-decisionmakers, may be considered "stray remarks" with so little probative value that a reasonable jury could not find for plaintiff. See Note 1, p. 111.

NOTE ON STEREOTYPING AND IMPLICIT BIAS

Pohasky's statements reflect the phenomenon of stereotyping individual members of a group because of the characteristics — or the perceived characteristics — of the group as a whole. Stereotyping is a key problem in the employment area because much discrimination stems from employer perceptions about the abilities of various groups (racial, ethnic, or gender) in society. Stereotypes are, in a sense, just generalizations, and generalizations can be accurate or inaccurate. To the extent that an employer acts against an individual on a generalization regarding race, gender, or other protected class, without pausing to consider whether that

generalization is true of the individual in question, there is likely to be a violation of Title VII.

But stereotypes differ from other kinds of generalizations in that they may operate below the level of cognition; the individual decisionmaker may be acting without being aware that bias is influencing their actions. Twenty-five years ago, in a groundbreaking work, Professor Linda Hamilton Krieger used the insights from cognitive psychology to conclude that stereotyping by race and gender is an "unintended consequence" of the necessity for humans to categorize their sensory perceptions in order to make any sense of the world. In *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995), Krieger explained:

> [The] central premise of social cognition theory [is] that cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment previously attributed to motivational processes. The social cognition approach to discrimination comprises three claims. . . . The first is that stereotyping . . . is nothing special. It is simply a form of categorization [of our sensory perceptions], similar in structure and function to the categorization of natural objects. According to this view, stereotypes, like other categorical structures, are cognitive mechanisms that all people, not just "prejudiced" ones, use to simplify the task of perceiving, processing, and retaining information about people in memory. They are central, and indeed essential to normal cognitive functioning.
>
> The second claim posited in social cognition theory is that, once in place, stereotypes bias intergroup judgment and decisionmaking. . . . [T]hey function as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people. These biases are cognitive rather than motivational. They operate absent intent to favor or disfavor members of a particular social group. And, perhaps most significant for present purposes, they bias a decisionmaker's judgment long before the "moment of decision" [when the employment decision in question is made], as a decisionmaker attends to relevant data and interprets, encodes, stores, and retrieves it from memory. These biases "sneak up on" the decisionmaker, distorting bit by bit the data upon which his decision is eventually based.
>
> The third claim follows from the second. Stereotypes, when they function as implicit prototypes or schemas [by which we evaluate each other], operate beyond the reach of decisionmaker self-awareness. Empirical evidence indicates that people's access to their own cognitive processes is in fact poor. Accordingly, cognitive bias may well be both unintentional and unconscious.

Id. at 1187-88. The phenomenon that Professor Krieger identified has a number of labels, including "implicit," "cognitive," "unconscious," or "unexamined" bias or discrimination. The related idea of "stereotyping" generally refers to acting on protected class stereotypes, which can either happen below the decisionmaker's consciousness, making it a type of implicit bias, or consciously and explicitly, as in

the case of Pohasky. See also Notes 3-4, p. 16 (on age stereotyping), Note 7, p. 88 (on sex stereotyping).

No one seems to doubt that implicit bias exists, but there is substantial debate about how pervasive it is and the extent to which it affects real-world decisionmaking. There are a host of studies bearing on the question, but the social science research that has perhaps received the most attention is the Implicit Association Test (IAT), which purports to measure how "attitudes" vary from people's expressed views. Hosted by Project Implicit at Harvard, https://implicit.harvard.edu/implicit, and open to anyone who wishes to take it, the IAT measures biases (or "implicit attitudes") by comparing how quickly a test taker equates positive and negative words with images of members of different protected classes — for example, comparing Black and White faces to test racial attitudes, or male and female faces to test attitudes on sex. These results are then compared with the subject's self-reported views on the protected class.

The IAT, which was created by three leading scientists in 1998, has generated a substantial social science literature analyzing results over two decades and literally millions of visits. By the mid-2000s, the IAT had garnered enthusiastic support from many antidiscrimination law scholars as a means of exposing the prevalence of unrecognized bias and its legal import. *E.g.*, Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 Harv. L. & Pol'y Rev. 477, 482 (2007); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 Cal. L. Rev. 1063 (2006). Jerry Kang et al., in Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124 (2012), offer a review of much of the literature followed by a discussion of how implicit bias enters the courtroom, including in employment discrimination cases, and proposed steps to "debias" decisionmaking.

On the other hand, during the same time period, the IAT generated a parallel body of criticism in the legal academy. Critics argued that measuring attitudes by millisecond responses to stimuli was inherently flawed and that, even if the test does in some sense identify attitudes, there was no evidence that those attitudes affect real-world decisionmaking. *E.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 Ohio St. L.J. 1023, 1023 (2006); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 Conn. L. Rev. 979, 984-85 (2008).

One key part of the dispute is the *evidentiary value* of measures of implicit bias in the general population, with IAT supporters suggesting such measures are useful as general background evidence to assist a factfinder in drawing inferences about otherwise inexplicable behavior (sometimes referred to as "social framework" evidence), and IAT detractors rejecting it entirely as not specific enough to use in any case. *Compare* Tanya Katerí Hernández, *One Path for "Post-Racial" Employment Discrimination Cases — The Implicit Association Test Research as Social Framework Evidence,* 32 J. L. & Inequality 307 (2014) (proposing one evidentiary use for the IAT); Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings*, 83 Temple L. Rev. 867, 875 (2011) (explaining the difference between general causation and

specific causation evidence); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389, 1432 (2008) (same), *with* John Monahan et al., C*ontextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*," 94 Va. L. Rev. 1715 (2008) (criticizing the social framework approach in the employment context). As you will see, the Supreme Court addressed this debate in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), reproduced at p. 141, siding with the detractors. *Id.* at 354 n.8 (citing Monahan et al., *supra*). We will revisit the role of implicit bias evidence in systemic disparate treatment cases in Chapter 2.

Of course, any discrimination may or may not be unconscious. Perhaps the conscious/unconscious division suggests a false dichotomy — that is, biases may often lie somewhere between those the subject is fully aware of (whether or not willing to admit to them) and those buried deep in the unconscious. *See* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 Emory L.J. 1053, 1058 (2009); Leora F. Eisenstadt & Jeffrey R. Boles, *Intent and Liability in Employment Discrimination*, 53 Am. Bus. L.J. 607 (2016). Indeed, this error is apparent in Justice Ginsburg's dissent in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Citing one well-known study revealing bias in the real world, she wrote:

> An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. In the 1970's orchestras began hiring musicians through auditions open to all comers. Reviewers were to judge applicants solely on their musical abilities, yet *subconscious bias led some reviewers to disfavor women.* Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens.

Id. at 373 n.6 (emphasis added) (internal citations omitted) (citing Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 715-16 (2000)). The Justice did not notice that the third sentence does not necessarily follow from the first. That is, subjective decisionmaking could facilitate discrimination of either the conscious or subconscious variety. In short, even if the IAT is correct in discerning a difference, it does not necessarily establish that the actor is unaware of their biases, as opposed to being reluctant to honestly report them. And some have urged that there is still plenty of old-fashioned conscious bias around. *See* Jessica A. Clarke, *Explicit Bias*, 113 Nw. U. L. Rev. 505 (2018); Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 Emp. Rts. & Emp. Pol'y J. 1 (2005).

But suppose that social science correctly reveals implicit biases that operate in the workplace. Is that illegal? Some believe that "unconscious discrimination" is an oxymoron. Although the Supreme Court has said that acting on the basis of stereotypes can violate Title VII, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), reproduced at p.73 ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group")*; Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), reproduced

at p.12 (acting on the basis of the stereotype that "productivity and competence decline with old age" is "the very essence of age discrimination"), it is not clear that it was referring to unconscious mental operations. Recently, however, the Court expressly invoked that concept in justifying the disparate impact theory under the Fair Housing Act. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 540 (2014) ("Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."). We cover disparate impact claims under Title VII in Chapter 3.

Consistent with that view, many scholars, not least of all Professor Krieger, argue that causation is all that is required; that is, if implicit bias results in an adverse employment action, liability follows. 47 Stan. L. Rev. at 1170. *Accord* Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 Conn. L. Rev. 979, 982-83 (2008); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 Va. L. Rev. 1893, 1900 (2009). Nevertheless, the normative question remains: *should* the statute be read to impose liability on those not consciously motivated to discriminate? Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 Hastings L.J. 67, 89-90 (2010); Amy Wax, *Discrimination as Accident*, 74 Ind. L.J. 1129 (1999).

Other scholars view the question as turning not on whether the employer decisionmaker has a conscious motivation to discriminate but rather whether the employer entity is taking steps to minimize the operation of bias in its workplace or, on the other hand, acting in a way that fosters it. *See* Stephanie Bornstein, *Reckless Discrimination*, 105 Cal. L. Rev. 1055 (2017); Tristin K. Green, Discrimination Laundering: The Rise of Organizational Innocence and the Crisis of Equal Opportunity Law (2016); Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 Berkeley J. Emp. & Lab. L. 1 (2018); Kevin Woodson, *Derivative Racial Discrimination*, 12 Stan. J. C.R. & C.L. 335 (2016); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 Vand. L. Rev. 849 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 485-90 (2001); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. Pa. L. Rev. 899 (1993). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1, 2-3 (2006). Some social scientific studies have shown that, while individuals' biases may be implicit, they are controllable with interventions: the thoughts may be automatic as the brain sorts information, but effective "debiasing" efforts can prevent the thoughts from being acted on. *See* Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 Hastings L.J. 1435, 1435 (2008); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, 94 Harvard Bus. Rev. 14; Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. Legal Stud. 199 (2006). Does this change your view of an employer's responsibility for the operation of bias within its organization?

NOTE ON THE EXTENT OF WORKPLACE DISCRIMINATION

Despite the reluctance of many to appreciate the extent of the problem, other social science research suggests pervasive bias exists. *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 Minn. L. Rev. 1275 (2012); Russell K. Robinson, *Perceptual Segregation*, 108 Colum. L. Rev. 1093 (2008). Perhaps most cogent but least numerous are "field experiments" or "audit studies" in which researchers try to directly test the operation of bias by having matched pairs of applicants — each pair as similar as possible except for the variable of interest (race or sex) — apply for real-world positions. If one group is more successful than the other, there is reason both to believe that bias exists and that it affects actual decisionmaking. A significant study in the employment context sent otherwise identical resumes to employers; those using names that "sounded" White received more favorable treatment than those using names that "sounded" Black. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991, 991-92 (2004). *See also* David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. Econ. 915, 917-18 (1996). An earlier instance was a study by the Urban Institute that sent matched pairs of Black and White testers into the job market, with African Americans faring substantially worse. Margery A. Turner, Michael Fix & Raymond J. Struyk, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring 37-66 (1991). *But see* Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 55-58 (1992).

A second approach to the question of the pervasiveness of bias is statistical and uses retrospective data to seek to hold constant a large number of variables in order to determine whether racial bias exists. A dramatic example (albeit not in the employment context) is research showing that National Basketball Association referees were more likely to call fouls on players of a different race than themselves. *See* Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q.J. Econ. 1859, 1859-60 (2010). More attuned to the employment setting, another study found that store managers were more likely to hire members of their own race than members of another race. *See* Laura Guliano, David Levine & Jonathan Leonard, *Manager Race and the Race of New Hires*, 27 J. Lab. Econ. 589 (2008).

Today, then, significant research has made clear that stereotypes and biases based on protected class status, whether explicit or implicit, are widespread in our society. What remains less clear is how antidiscrimination law should respond. To what extent is unequal treatment in the workplace the result of implicit bias as opposed to old-fashioned animus or what has been called "rational discrimination"? And does a law often described in terms of "intentional" discrimination reach unconscious actions? In short, to what extent can and should employers be held liable for the operation of protected class biases in their workplaces? We will revisit these questions as we work our way through the course. For now, keep in mind that the inference of discriminatory "intent" is usually drawn from the circumstances of the particular adverse employment decision, regardless of whether the factfinder believes the decision was consciously discriminatory or simply the result of implicit bias.

Hazen Paper Co. v. Biggins

507 U.S. 604 (1993)

Justice O'Connor delivered the opinion of the Court.

[Hazen Paper Company manufactures coated, laminated, and printed paper and paperboard. It is owned and operated by two cousins, petitioners Robert Hazen and Thomas N. Hazen. Walter F. Biggins was hired as technical director in 1977. He was fired in 1986, when he was 62 years old. Biggins sued, claiming to have been discharged in violation of both the Age Discrimination in Employment Act and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1140. The company claimed that he had been fired for doing business with competitors. The case was tried to a jury, which rendered a verdict for Biggins on his ADEA claim and also found a violation of ERISA. The district court denied defendant's motion for a judgment as a matter of law, and the court of appeals affirmed.]

In affirming the judgments of liability, the Court of Appeals relied heavily on the evidence that petitioners had fired respondent in order to prevent his pension benefits from vesting. That evidence, as construed most favorably to respondent by the court, showed that the Hazen Paper pension plan had a 10-year vesting period and that respondent would have reached the 10-year mark had he worked "a few more weeks" after being fired. There was also testimony that petitioners had offered to retain respondent as a consultant to Hazen Paper, in which capacity he would not have been entitled to receive pension benefits. The Court of Appeals found this evidence of pension interference to be sufficient for ERISA liability, and also gave it considerable emphasis in upholding ADEA liability.

. . . The courts of appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age. We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age. . . .

. . . In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. As we explained in *EEOC v. Wyoming*, 460 U.S. 226 (1983), Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

> Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on

> stereotypes unsupported by objective fact. . . . Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.

Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. Pension plans typically provide that an employee's accrued benefits will become nonforfeitable, or "vested," once the employee completes a certain number of years of service with the employer. On average, an older employee has had more years in the work force than a younger employee and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."

The instant case is illustrative. Under the Hazen Paper pension plan, as construed by the Court of Appeals, an employee's pension benefits vest after the employee completes 10 years of service with the company. Perhaps it is true that older employees of Hazen Paper are more likely to be "close to vesting" than younger employees. Yet a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be ____") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee — that he indeed is "close to vesting."

We do not mean to suggest that an employer lawfully could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under §510 of ERISA, as the Court of Appeals rightly found in affirming judgment for respondent under that statute. But it would not, without more, violate the ADEA. That law requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify further characteristics that an employer must also ignore. Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, see *McDonnell Douglas Corp. v. Green* (creating proof framework applicable to ADEA; employer must have "legitimate, nondiscriminatory reason" for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older lack worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, *cf. Metz* [*v. Transit Mix Co.*, 828 F.2d 1202, 1208 (7th Cir. 1987)] (using "proxy" to mean statutory equivalence), but in the sense that the employer may suppose a correlation between the two factors and act accordingly. Nor do we rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service, and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service.

Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no "direct evidence" of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision — here, that respondent had been disloyal to Hazen Paper by doing business with its competitors — is " 'unworthy of credence.'" But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. . . . We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation. . . .

NOTES

1. *Mixed Motives and Causation.* When a decision is "wholly motivated" by pension discrimination, age discrimination cannot be a determinative factor, or even a motivating factor. One reason Biggins was discharged was to prevent his pension from vesting. That reason is illegal under ERISA but nevertheless would be a nondiscriminatory reason under the ADEA. (If you're wondering why the defendant took the ADEA claim to the Supreme Court, it probably was due to the "liquidated damage" provision of the ADEA, absent from ERISA, which would double a part of his recovery. See Chapter 9, p. 680.)

However, pension discrimination might not be the only cause of the discharge. The Court recognized that both age bias and pension discrimination might coexist. Further, it necessarily recognized that either or both could be a "but for" cause in the sense that the same decision would have resulted from one had the other been absent. Otherwise, with a verdict finding pension discrimination, the Court would not have remanded for a trial on the age claim. In short, if either age or vesting would have caused the discharge, both would be but-for causes. In the language

of tort law, causation in this situation can be "overdetermined" — that is, when either of two negligent acts would have independently produced the harm, liability is appropriate for both. We'll explore this later in more depth.

Despite this logical possibility, the existence of two motives makes it harder for a jury to find that either actually caused the discharge when a plaintiff is required to prove "but for" causation. Recall that the placement of the burden of persuasion on plaintiff means that the plaintiff bears the risk of jury equipoise. If the jury finds each to be a 50 percent cause, plaintiff loses. If the jury cannot choose which of the two causes is determinative, it must find for the defendant on both counts. How often a plaintiff's case fails because of this possibility is unclear. In *Biggins* itself, plaintiff won on one ground, but the success of his ERISA claim may have doomed his ADEA claim. On remand, the second jury found for the defendants on the ADEA claim. 11 F.3d 205, 208 (1st Cir. 1997).

In the more typical case, of course, the nondiscriminatory reason will not be independently illegal. So a scenario in which the employer was motivated by *both*, say, race and *any other legal consideration* raises the mixed motive question at its starkest: if race is determinative, employer loses. If it is not, employer wins. But the analysis does not change: the factfinder must find by a preponderance of the evidence that the prohibited consideration was a determinative factor, a but-for cause of the adverse employment action. It must, in other words, be at least the straw that broke the camel's back. *See Burrage v. United States*, 571 U.S. 204, 211 (2014) ("[I]f poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived."). Other considerations may or may not be present, but it is the plaintiff's burden to prove but-for causation. Remember, however, that there may be more than one but-for cause. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020), reproduced at p. 312.

2. *Getting Inside the Employer's Mind to Prove Age Discrimination.* The Hazens made several "stray comments" about Biggins's age, *i.e.*, comments showing that his age was on their minds, but these were not made at the moment of his discharge. Does that support finding that age may have played a role in his discharge but not sufficiently to show that, but for his age, he would not have been fired? Suppose an employer asks an older worker about her plans for retirement. Courts have been very reluctant to see bias in such comments. *E.g., Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 605-06 (7th Cir. 2012). In contrast, in *Sharp v. Aker Plant Servs. Group, Inc.*, 726 F.3d 789, 799 (6th Cir. 2013), an employee tape-recorded a conversation regarding his layoff, which provided "a window into the mind of an employment decision maker." The recorded comments were that the employer's "succession plan was to hire or retain younger workers at the expense of older workers because it was more likely that the former would stay with the company longer than the latter." The statements "disclose[d] no analytical step between computing an employee's potential longevity with the company and his age." *Id.* at 801. *But see Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 986 F.3d 711 (7th Cir. 2021) (describing the plaintiff as "at the end of her career" did not create a triable case of age discrimination when consideration of whether a prospective employee may serve the long-term needs of a company is a legitimate, non-discriminatory factor in making hiring recommendations). See also Note 1, p. 111 (on "stray remarks").

3. *Age Discrimination as Acting on Stereotypes.* Whether the jury properly found age discrimination depends on for what it was supposed to have been looking. The Court found the answer easy: "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." Another stereotype is that older workers are "set in their ways," unwilling or unable to adapt to new technologies and techniques. *See EEOC v. Board of Regents of the University of Wisconsin*, 288 F.3d 296, 303 (7th Cir. 2002) (references to plaintiff as having "skills suited to the 'pre-electronic' " and having "to be brought 'up to speed' on 'new trends of advertising with electronic means'" could be found to be code words for age stereotypes). *See also Hilde v. City of Eveleth*, 777 F.3d 998, 1006 (8th Cir. 2015) (to assume that a candidate "was uncommitted to a position because his age made him retirement-eligible is age-stereotyping that the ADEA prohibits").

To find age discrimination in *Biggins*, must the jury believe that the Hazens fired Biggins because his increasing age led them to (incorrectly) conclude that his competence was declining? How likely is that? Aren't employers more likely to act on "inaccurate and stigmatizing stereotypes" regarding competence in refusing to hire older workers than in firing them? In this case, the Hazens had the opportunity to watch plaintiff perform over almost a decade. If they fired him because they believed his competence was diminishing, how could that be the result of a stereotype? Or does the implicit bias literature explain this? *See* Ina Jaffe, *Older Workers Find Age Discrimination Built Right into Some Job Websites* (report about websites with resume-building applications that excluded older workers through their use of drop-down menus with limited ages), http://www.npr.org/2017/03/28/521771515/older-workers-find-age-discrimination-built-right-into-some-job-sites. To prevail, would Biggins have had to show (a) that the Hazens incorrectly evaluated his competence and (b) that they attributed his perceived loss of competence to his age? What if they correctly believed Biggins's competence was dropping but also attributed it to his age as a result of implicit bias? An employer can discharge a worker for becoming less competent but not if a worker younger than Biggins with a similar level of competence would have been retained.

4. *What If Stereotypes Are True?* Don't productivity and competence in fact decline with increasing age, at least in many jobs and at some age? This may be a stereotype that is, nevertheless, true. In such situations, there is little need for cognitive bias as an explanation. Ironically, the more accurate the stereotype, that is, the greater the degree to which it conforms to reality, the less need there is for implicit bias, animus, or subordination as an explanation. If the law did not intervene, a "rational" employer might exclude older workers if, say, their health insurance costs were substantially higher than younger workers, or women, if, say, pregnancy or childcare responsibilities made them, on average, less productive workers. *See* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 Geo. L.J. 1619, 1622 (1991). The point is not that such "statistical discrimination" is legal if it's rational: statistical discrimination is almost always illegal, even if the employer is correct in its perceptions (and often it isn't). To rely on statistical discrimination violates the legal requirement that employers treat employees as individuals. See Note on Stereotyping and Implicit Bias, p. 6. Rather, the point is that discrimination is a more plausible explanation when it furthers the employer's self-interest.

McDonnell Douglas Corp. v. Green

411 U.S. 792 (1973)

Justice POWELL delivered the opinion of the Court.

. . . Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964, when he was laid off in the course of a general reduction in petitioner's work force.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated. As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the "stall-in" as follows:

> [F]ive teams, each consisting of four cars would "tie up" five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.
>
> Acting under the "stall in" plan, plaintiff [respondent in the present action] drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 A.M., at the start of the morning rush hour. Plaintiff was aware of the traffic problem that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined.

[O]n July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the "stall-in." . . .

The District Court . . . found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or §704 [the antiretaliation provision] protected "such activity as employed by the plaintiff in the 'stall-in' and 'lock in' demonstrations."

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under §704(a), but reversed the dismissal of respondent's §703(a)(1) claim relating to racially discriminatory hiring practices. . . .

II

The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *Griggs v. Duke Power Co.* [reproduced at p. 189]. As noted in *Griggs*, "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. . . .

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise. In this case, respondent, the complainant below, charges that he was denied employment "because of his involvement in civil rights activities" and "because of his race and color." Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. . . .

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13] In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications[14] and acknowledges that his past work performance in petitioner's employ was "satisfactory."

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable

13. The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

14. We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be "shown to bear a demonstrable relationship to successful performance of the jobs" for which they were used, *Griggs v. Duke Power Co.* [reproduced at p. 189].

basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carr[ies] little weight in rebutting charges of discrimination." This was among the statements which caused the dissenting judge to read the opinion as taking "the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved . . . ." Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned "stall-in," designed to tie up access to and egress from petitioner's plant at a peak traffic hour. Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.[17] . . .

Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by §703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. . . . *Blumrosen, Strangers in Paradise:* Griggs v. Duke Power Co.*, and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 91-94 (1972).[19] In short, on the retrial

17. The unlawful activity in this case was directed specifically against petitioner. We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification reason for refusal to hire.

19. The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision.

The court below appeared to rely upon *Griggs v. Duke Power Co.*, in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and in the absence of proof or pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.[21] . . .

NOTES

1. *A Surprising Decision?* The evidence Green presented showed simply that he had not been hired for a job that he applied for, a job he had previously performed successfully for the same employer. There was no unequal treatment evidence, no admissions testimony, no showing the employer acted on racial stereotypes. Further, the employer asserted that it had a good reason for not rehiring Green that had nothing directly to do with his race: Green's prior criminal activity aimed at it. Looking at the case from that perspective, was it a surprise that the trial court rejected Green's Title VII case? Nevertheless, do you think that race was a factor in the employer's action?

2. *The Mantra.* In employment discrimination law, "*McDonnell Douglas*" is more a mantra than a decision. That may not be a surprise since it was the first Supreme Court decision involving what we now refer to as "individual disparate treatment,"

21. It is, of course, a predictive evaluation, resistant to empirical proof, whether "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." But, in this case, given the seriousness and harmful potential of respondent's participation in the "stall-in" and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification. As the Court has noted elsewhere: "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust." *Garner v. Los Angeles Board*, 341 U.S. 716, 720 (1951).

the most common kind of discrimination claim. For example, in 2020 alone, it was cited by the federal courts more than 1,700 times. While *McDonnell Douglas* is iconic, its meaning can be understood at several levels. At the most general level, *McDonnell Douglas* establishes a three-step structure: (1) the plaintiff must establish a prima facie case of discrimination, which creates a "presumption" that the employer discriminated. Once the prima facie case is established, the employer (2) has the burden of putting into evidence a nondiscriminatory reason for the alleged discriminatory decision. Carrying that burden destroys the presumption, but (3) the plaintiff has the opportunity to prove that the supposed reason was really a pretext for an underlying discriminatory motivation. Notably, this structure does not reflect separate steps in a Title VII trial — rather, it's merely a method of analyzing a claim — whether at summary judgment or at trial.

However, there are at least three other meanings of *"McDonnell Douglas."* First, the shorthand is also frequently cited for the case's four-pronged statement of what it takes to establish the plaintiff's prima facie case. Second, "*McDonnell Douglas*" is also invoked for the proposition that the plaintiff must prove that her protected characteristic was a determinative factor — a but-for cause — of the action the defendant took against her. *E.g., Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009 (2020), reproduced at p. 103. Third, *"McDonnell Douglas"* is sometimes used to distinguish a method of proof using "circumstantial" evidence, which requires a factfinder to draw an inference of discrimination, from a method using more "direct" proof, which is so obviously discriminatory that it requires no inference. See Note 5, p. 87. All too often, the several usages are not clearly differentiated.

3. *The First Step: The Prima Facie Case.* Citing *McDonnell Douglas* to mean its four-pronged specification of the prima facie case is questionable. While the Court framed the prima facie case in terms of four specific factual showings that seemed almost like "elements" necessary to make out a claim, the Court stressed in footnote 13 that these specific elements could not fit every fact situation. In *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977), reproduced at p. 126, the Court departed from a by-the-numbers approach to describe the rationale for the prima facie case:

> Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

To generalize from *Teamsters*, the *McDonnell Douglas* prima facie case proves discrimination by eliminating the most common, nondiscriminatory reasons for an employer's action, leaving for the factfinder to decide if plaintiff's claim of discrimination is the most likely reason for that action. In the case itself, the most common legitimate reasons for refusing to rehire Green would have been the lack of a job opening or Green's lack of qualifications — neither of which was alleged.

That's important because the particular four prongs of the *McDonnell Douglas* prima facie case are inapplicable to the vast majority of discrimination claims! In most hiring cases, after all, the position does not remain open; rather, the plaintiff loses out to another applicant. In discharge cases, the plaintiff has worked for the employer and is let go.

4. *Other Versions of the Prima Face Case.* The courts applying the *McDonnell Douglas* prima facie case in fact adapt it in big and small ways that often vary between circuits and even within circuits. For example, in individual discharge cases, some courts have required proof that the plaintiff was doing "satisfactory work" to negate the most obvious reason for termination, *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045 (9th Cir. 2012); *cf. Zayas v. Rockford Mem'l Hosp.*, 740 F.3d 1154, 1158 (7th Cir. 2014) (prior satisfactory performance evaluations did not establish that plaintiff was meeting the employer's legitimate job expectations at the time she was fired given more recent disciplinary actions), and some require a showing of replacement by someone outside the plaintiff's protected group. *Shazor v. Prof'l Transit Mgmt.*, 744 F.3d 948, 957 (6th Cir. 2014).

In contrast, in "downsizing" or "reductions in force," where a number of employees are terminated simultaneously, the "legitimate, nondiscriminatory reason" — the need to reduce expenses — is apparent on its face. Because "positions" are being eliminated, the power of proof that the plaintiff is doing an apparently satisfactory job diminishes. Further, there is usually no "replacement" — younger or otherwise — for the plaintiff. In such cases, courts have altered *McDonnell Douglas* to require a plaintiff to produce other evidence, such as identifying younger workers who were retained when the plaintiff was discharged. *E.g., Willard v. Huntington Ford, Inc.*, 952 F.3d 795, 800 (6th Cir. 2020); *Ward v. Int'l Paper Co.*, 509 F.3d 457, 460 (8th Cir. 2007).

Given these variations, courts are increasingly likely to describe the plaintiff's burden in tautological terms. *See Green* v. *Town of E. Haven*, 952 F.3d 394, 403 (2d Cir. 2020) ("to establish a prima facie case of age discrimination," the plaintiff "must show (1) that she was within the protected age group, (2) that she was qualified for the position, (3) that she experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination.") (quoting *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 107 (2d Cir. 2010)). One court has treated the "inference of discrimination" prong as to essentially subsume the entire *McDonnell Douglas* litigation structure. *Young v. Builders Steel Co.*, 754 F.3d 573 (8th Cir. 2014) (plaintiff failed to prove a prima facie case because he could not establish the inference-of-discrimination element by showing that the defendant's reason was pretextual, which obviated the need to engage in the *McDonnell Douglas* burden-shifting analysis). See also Note on "Reverse" Discrimination, p. 52.

In short, the "*McDonnell Douglas* prima facie case" is an approach, not a set of elements. Further, since the purpose of the prima facie case is to eliminate at least some common nondiscriminatory reasons, the courts have often described the plaintiff's burden as very light, and they have stressed the importance of not shifting proof of pretext back into the prima facie case. *See Ruiz v. County of Rockland*, 609 F.3d 486 (2d Cir. 2010) (a defendant's claim of serious misconduct by the plaintiff does not bar his making out a prima facie case when his performance

evaluations showed satisfactory work: "the step at which the court considers such evidence is important" because "no amount of evidence permits a plaintiff to overcome a failure to make out a prima facie case"). *Cf. Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (holding that district courts should not decide whether the plaintiff actually made out a *McDonnell Douglas* prima facie case in deciding an employer's motion for summary judgment or judgment as a matter of law once defendant has asserted a nondiscriminatory reason).

5. *The Prima Facie Case Does Not Shift the Burden of Persuasion.* While it may be easy to establish a prima facie case, a plaintiff correspondingly does not get much reward. The resulting "presumption" merely requires the employer to put into evidence its nondiscriminatory reason for the adverse employment action it took. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), the Court described the consequences of proof of a prima facie case: "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." However, defendants *always* come up with some reason, and *Burdine* made clear that, when they do so, the presumption disappears (the "bubble bursts" as some Evidence sources describe it). Thus, only in the virtually non-existent case in which an employer fails to put into evidence some other explanation for its action will the plaintiff get judgment solely based on the jury believing the evidence establishing the prima facie case.

In accompanying footnote 7, *Burdine* said the term "prima facie case" in *McDonnell Douglas* denoted "the establishment of a legally mandatory, rebuttable presumption," not a description of "the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." *Id.* Isn't it odd that evidence could create a presumption of discrimination when it might not be enough to allow a jury to find that discrimination exists? While the distinction may seem subtle, it's incredibly important: since the prima facie case does not necessarily constitute a sufficient basis for the factfinder to infer discrimination, *proof of such a case does not mean that the plaintiff goes to the jury.* If *Burdine* had held the contrary, every Title VII case would warrant a jury trial when the plaintiff established a prima facie case; the defendant's legitimate nondiscriminatory reason would, at most, give the jury a way to hold against the plaintiff. In fact, as we will see, getting to the jury turns less on the plaintiff's prima facie case than on the plaintiff's proof of pretext at the third step.

6. *The Second Step: Defendant's Easy Rebuttal.* The defendant may satisfy its burden of production to rebut a prima facie case by "articulat[ing] some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas* established that disloyalty is such a reason. But less rational or even illegal reasons also suffice. *See Biggins.* Suppose the court finds as a fact that Green was not rehired because he was a vegetarian. In *Purkett v. Elem*, 514 U.S. 765 (1995), a case dealing with peremptory challenges to jurors, the prosecutor explained its exclusion of several Blacks because of their hair length and facial hair and not their race. The Supreme Court relied on Title VII analysis to indicate that even nonsensical explanations — "implausible," "silly," "fantastic," or "superstitious" — satisfied the defendant's burden of production. In *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 418 (7th Cir. 2006), Judge Posner wrote: "the question is never whether the employer was mistaken,

cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason *was* his reason: not a good reason, but a true reason."

7. *The Requirements for Defendant's Rebuttal Case.* Indeed, there are only two meaningful requirements for the defendant's rebuttal. First, the defendant must be able to put the reason into *evidence*; because the defendant bears the burden of production at this step, it is not enough for the defendant to merely argue the possibility of a nondiscriminatory reason for its decision. *See Burdine*, 450 U.S. at 254-55. Second, the defendant must provide a sufficiently specific reason to carry its burden of production. *See Figueroa v. Pompeo*, 923 F.3d 1078, 1092 (D.C. Cir. 2019) ("an employer at the second prong must proffer admissible evidence showing a legitimate, nondiscriminatory, clear, and reasonably specific explanation for its actions. The evidence must suffice to . . . provide the employee with a full and fair opportunity for rebuttal. When the reason involves subjective criteria, the evidence must provide fair notice as to how the employer applied the standards to the employee's own circumstances. Failing to provide such detail — that is, offering a vague reason — is the equivalent of offering no reason at all."); *Alvarado v. Texas Rangers*, 492 F.3d 605 (5th Cir. 2007) (complete absence of explanation of criteria or basis for scores on interviews prevented employer from carrying its burden of production). This specificity requirement can be drawn from footnote 8 of *Burdine*, where the Court described the purpose of the shifting burdens: "[i]n a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." 450 U.S. at 256 n.8.

8. *The Third Step: Proving Pretext.* A standard dictionary definition of "pretext" is "a reason given in justification of a course of action that is not the real reason." The New Oxford American Dictionary (3rd ed. 2015). Some lower courts, however, define "pretext" even more pointedly to mean that the defendant lied. For example, Judge Posner in *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 419 (7th Cir. 2006), emphasized that evidence that the defendant's proffered reason was not factually correct was not necessarily probative of pretext because "[a] pretext is a deliberate falsehood. . . . An honest mistake, however dumb, is not."

A number of other courts have framed this in terms of an "honest belief rule": the question is not whether the asserted reason is true but whether the defendant believed it to be true when it took the challenged action. *AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005) ("the proper inquiry is not whether AT&T was factually correct in determining that Johnson had made the bomb threats. Rather, the proper inquiry is whether AT&T honestly believed that Johnson had made the bomb threats").

Professor Martin Katz agrees that proof of "pretext" requires proving that the defendant lied when it asserted its legitimate, nondiscriminatory reason, but argues that a lie can be found from proof that the defendant's asserted reason was not true. Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 Notre Dame L. Rev. 109, 122 n.56 (2007). *See also* Sandra F. Sperino, *Disbelief Doctrines*, 39 Berkeley J. Emp. & Lab. L. 231, 238-40 (2018) (surveying court approaches to the honest belief rule). This suggests that Posner is both right and wrong: a finding by the jury that the defendant's reason is not the real reason does not automatically justify a finding

of pretext but would often (usually?) permit the inference that the defendant was lying by asserting it. Posner is wrong if he is insisting there must be evidence, separate from the evidence that the defendant's reason was not true, that the defendant lied about it being the reason. As we will soon see, this would resurrect in new language the "pretext-plus" rule repudiated in *Reeves v. Sanderson Plumbing Products, Inc.*, reproduced at p. 28.

Professors Linda Hamilton Krieger and Susan T. Fiske, in *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997, 1036 (2006), take a dramatically different approach to the whole truth-or-lie question. They criticize the honest belief rule as "plainly inconsistent with what empirical social psychologists have learned over the past twenty years about the manner in which stereotypes, functioning not as consciously held beliefs but as implicit expectancies, can cause a decisionmaker to discriminate against members of a stereotyped group." Thus, if acting on implicit bias is nevertheless intentional discrimination, then the fact that the defendant acted on its "honest belief" is not determinative of whether there is discrimination. *See also* Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 401 (2010).

9. *Pretext for Discrimination.* What about the possibility that the defendant lied, but not to conceal its discrimination? Suppose that, despite defendant's stated reason, the real reason Green was not rehired was because McDonnell Douglas's hiring director was saving the job for the director's nephew. If the *McDonnell Douglas* proof structure was designed to progressively sharpen the inquiry, wouldn't a decision by the factfinder that the defendant lied mandate judgment for the plaintiff, absent a remaining nondiscriminatory explanation in the record?

While that seems a reasonable conclusion, the Supreme Court has held to the contrary. Proof of pretext, in the sense of proof that the defendant's asserted reason is not the real reason for the action is *not necessarily* sufficient to find for the plaintiff. Rather, the factfinder has to find both (1) the defendant's reason to be pretextual *and* (2) the pretext to be a cover-up for an underlying discriminatory motive. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993), discussed further at Note 5, p. 36, held that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, 'no additional proof of discrimination is *required*'" (emphasis added). However, *St. Mary's Honor Center* stressed that the factfinder must nevertheless find a discriminatory motivation. Another way to say it is that proof of pretext permits, but does not require, an inference of discriminatory intent.

10. *A Process of Elimination?* Professor Michael Zimmer, drawing from *Teamsters*, has described *McDonnell Douglas* as a process of elimination: the plaintiff eliminates the most common legitimate, nondiscriminatory reasons for the adverse employment action by proving a prima facie case and then eliminates the defendant's asserted legitimate, nondiscriminatory reason. Since employers can be assumed to act for *some* reason, elimination of these reasons allows the factfinder to infer that discrimination is the remaining reason for the employer's action. Michael J.